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NOTES OF INDIAN CASES.

JAGADEESAM PILLAI *v.* KUPPAMMAL, (1946) 1 M.L.J. 23.

Certain observations in this decision regarding the meaning of private land as defined in section 3 (10) of the Madras Estates Land Act fall to be noted. Reference is made to the unreported decision in *Tiruvarur Sri Tyagaraja Swami Devasthanam Rajan Kattalai* v. *Muthuswami Odayar*(A. A. O. No. 311 of 1943) where it had presumably been held that land which had never been ryoti and which was shown to have been treated however in many respects as if it were ryoti could come under the heading of domain or home-farm land even though there was no proof that there had been actual cultivation by the landholder, and it is remarked : "with some of the observations contained in that judgment we must express our respectful disagreement." What observations are dissented from is not clear. But in construing section 3 (10)(*b*) it is suggested that in sub-clause (*i*) the terms "domain" or "home-farm" lands mean lands which the landlord himself farms as distinguished from the lands referred to in the other clauses which should therefore be understood as relating to lands "which are at a distance from the domain or home-farm but have been cultivated personally by the landlord." If the lands are appurtenant to the mansion they will be home-farm lands. If they are away they are not. The test of the relative distance from the residence or mansion as decisive of the character of the lands as home-farm land may be in consonance with the facts of feudal life in England, under the manorial system. The assumption that the test will equally apply in India is however debatable. Under section 3 (10) domain land includes "pannai" land. The latter term signifies just lands which are cultivated under the owner's direct supervision. Their proximity to the owner's residence does not enter into calculation. It is true that in *Zemindar of Chellapalli* v. *Somayya*[1] reference was made to the sense in which domain land is understood in England but it is noteworthy that the Privy Council merely approved the view that intention of the owner to retain land as resumable for cultivation by himself even when from time to time he demised it for a season was the test to determine whether a piece of land was home-farm land or not, see *Yarlagadda Mallikarjuna* v. *Somayya*[2]. To import the further requirement that it is only if the lands are appurtenant to the mansion of the landholder that they can be regarded as home-farm lands does not seem to be justified by the facts of life prevailing in this Presidency.

SANKARAM NAMBIAR *v.* KOTTAYAM BANK, (1946) 1 M.L.J. 53.

Section 235 of the Companies Act empowers the Court to assess damages against delinquent directors and officers of the company on the application of a liquidator, or of any creditor or contributory. The jurisdiction exercisable is summary. It is concerned only with an inquiry into the conduct of the officers of the company in relation to the company's property. Section 198 provides that all powers conferred by the Act shall be in addition to and not in restriction of any existing powers in regard to the instituting of proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums of money. *En passant* it may be noted that while section 198 contemplates proceedings either against the person or against his estate,

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1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.

2. (1918) 36 M.L.J. 257 : L.R. 46 I.A 44 : I.L.R. 42 Mad. 400 (P.C.).

section 235 refers only to proceedings being instituted against the delinquent. The difference in approach of these sections would suggest that in proceedings under the latter section, the powers available under section 198 cannot be exercised. Nor can the provisions of O. 22, r. 4, of the Civil Procedure Code be of any help, inasmuch as, for one thing it is doubtful if the provisions of the Civil Procedure Code are applicable to proceedings under section 235 of the Companies Act. In *Mulk Raj* v. *Official Liquidator, People's Bank*[1], it is, for instance, stated that though an application under section 235 is in the nature of a plaint and the proceedings are judicial proceedings, still the provisions of the Civil Procedure Code cannot be applied to such an application because express provisions for its contents and the formalities connected with it are provided for by the Companies Act and the rules made thereunder, and hence the provisions of O. 2, rule 6, cannot be invoked. The proceedings under section 235 are purely domestic proceedings and there is nothing in the language of section 235 to suggest that the right to sue survives. The decision in *Official Liquidators, Mufassil Bank* v. *Jugal Kishore*[2] holds that a proceeding under section 235 against a director cannot after his death during the proceedings be continued against his heirs as representing his estate. The same conclusion was reached in *Manilal Brijlal* v. *Vandravandas*[3] where it was held that section 235 cannot be applied against the personal representatives of a deceased liquidator and that the section was never intended to involve the Court on an application under the section in an inquiry relating to the estate of the deceased person. The decision in the case under examination has taken the same view of the scope of section 235.

MAHALAKSHMAMMA *v.* SURYANARAYANA SASTRI, (1946) 1 M.L.J. 196.

This decision holds that the provisions of the Hindu Law of Inheritance (Amendment) Act, 1929, cannot apply to regulate succession to the stridhana property of a married woman who had died leaving neither descendants nor her husband. The matter is, however, one on which there is conflict of judicial opinion. It is now finally settled by the decision of the Judicial Committee in *Chhaterpati Pratap Bahadur* v. *Lachmidhar Prasad Singh*[4], that in default of husband in the case of a woman married in the approved form and in default of the father in all other cases the heirs of the husband or father succeed to the woman's property in the order laid down in the texts of Yagnavalkya II, 135-136, relating to the succession to the property of a male, as pointed out by Kamalakara in his Vivada Tandava[5]. This does not however carry with it the implication that in the matter of succession to stridhana, the order prescribed by Yagnavalkya is to be understood as the order laid down by his Smriti as modified by present day legislation affecting succession to the property of males. Turning to the Act of 1929, it is avowedly an enactment to alter the order in which certain heirs of a Hindu *male* are entitled to succeed to *his* estate. Section 1 (2) declares that the Act applies only to persons governed by the Mitakshara law and that too in respect only of the *property of males* not held in comparcenary and not disposed of by will. Section 3 (3) provides that nothing contained in the Act shall enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir. All the provisions *prima facie* suggest that it is only to the estate of a male that they are to apply. In other words, the relevant criterion is the sex of the person to whom inheritance opens. In *Mussammat Charjo* v. *Dinanath*[6], the Lahore High Court recognised that the Act in terms regulates succession only to the property of a Hindu male and does not purport to alter the law in respect of the property of a female and that in regard to a wife's stridhanam inherited by the husband, such property would on his death descend in the same way as if it belonged to him. Tek Chand, J., went on to add that to ascertain who the heirs of the husband are the Court must *ex necessitate rei* refer o the law governing suc-

1. 180 I.C. 254 : A.I.R. 1938 Lah. 658.
2. I.L.R. (1939) All. 6.
3. I.L.R. (1944) Bom. 284.
4. (1946) 2 M.L.J. 411 (P.C.).
5. Ghose: Principles of Hindu Law, 1917 Edn., p. 1155, l. 23 and p. 1142.
6. A.I.R. 1937 Lah. 196.

cession to the property of the husband in force when the succession opens out. This might mean that in the case of a married woman who died without leaving descendants or her husband, her property would devolve on that person who on that day according to the law then in force would be the husband's nearest heir which would mean that the heir will be ascertained, where succession had opened out after the Act II of 1929 came into force, according to Yagnavalkya's text as modified by the Act. In *Raghunandan* v. *Keshavrao*[1], it was held by Somjee, J., with reference to the property of a maiden that in the absence of uterine brother, mother and father, the nearest heir of her father at the time of her death would take and such heir should be ascertained according to the law as it exists at the time of her death and that if that event is after 1929 the heirs of the father should be determined by reference to the provisions of the Hindu Law of Inheritance (Amendment) Act, 1929. A contrary view is propounded in *Sakuntalabai* v. *The Court of Wards*[2], where it is held that in such cases the priority between rival claimants has to be decided only according to the Hindu textual law and considerations derived from the Hindu Law of Inheritance (Amendment) Act, 1929, are irrelevant. It may with respect be stated that the latter view alone seems to be the correct view. For on the language of the Act, for it to apply, it is the character of the property at the time succession opens, whether at that moment it was the absolute property of a male, that is the crucial consideration. Where it does not possess that character and was the absolute property of a woman the case would stand outside the Act. Anyway having regard to the importance of the issue involved it is highly desirable that the matter is elucidated by the Privy Council.

HANUMANTHA GOWD *v.* OFFICIAL RECEIVER, BELLARY, (1946) 1 M.L.J. 247.

The terms "devolution" and "devolve" occur frequently in enactments. They are not in any sense terms of art. "Devolve" from Latin *de*: down and *volvere*: to roll, means to roll down, to hand down or deliver over. Devolution thus signifies the process of passing from one person to another. Section 28 (4) of the Provincial Insolvency Act prescribes that all property which is "acquired by or devolves on" the insolvent after the date of his adjudication and before his discharge shall forthwith vest in the Court or the receiver. A similar provision is incorporated in section 52 (2) (*a*) of the Presidency Towns Insolvency Act. The question that had to be considered in the present case was whether an increase in the interest of the insolvent in the properties of the joint family consequent on the death of a coparcener betwen the date of his adjudication and his discharge would vest in the official receiver. In *Jalan District Co-operative Bank at Orai* v. *Official Receiver, Jhansi*[3], it is pointed out that section 28 (4) refers to property which the insolvent acquires by his own efforts such as his wages or salary or to property which devolves on him by rule of law such as by inheritance. The distinction seems to be that in acquisition there is individual effort whereas in devolution there is none. If that is all the distinction, then the use of the two terms in the collocation would indicate that property coming to the insolvent in any mode whatever would vest in the official receiver or the Court. A distinction between the taking of property by inheritance and the augmentation of interest by survivorship has however been maintained in cases relating to the necessity of procuring succession certificates, see *Sheetal Chandra Datta* v. *Lakshimanee Dasee*[4], *Vairavan Chetty* v. *Sreenivasachari*[5]. If the distinction is not confined to the particular class of cases it would be powerful argument to show that the term "devolution" could only subsume the passing of property by inheritance and would not cover an enlargement of interest by survivorship. The terms "devolution" and "devolve" are used in various enactments, such as the Civil Procedure Code (O. 22, r. 10); the Indian Succession Act, 1925 (section 32); the Government of India Act, 1935 (entry 21, in List II of schedule VII); the Madras Estates Land Act, 1908 (section 145); the Madras Proprietary Estates Village Services Act (section 10);

1. I.L.R. (1939) Bom. 228.
2. I.L.R. (1942) Nag. 629.
3. 156 I.C. 751 : A.I.R. 1935 All. 279.
4. (1935) I.L.R. 63 Cal. 15.
5. (1921) I.L.R. 44 Mad. 499 (F.B.).

the Mapilla Marumakkatayam Act, 1939 (section 18); the Mapilla Succession Act (section 3); the Madras Hindu Religious Endowments Act, 1927 (section 9) (*vi*); the Madras Marumakkattayam Act, 1933 (sections 18 and 25); etc. As to the meaning of "devolution" generally, reference may be made to *Parr* v. *Parr*[1] and *Cope* v. *Earl De La Warr*[2]. The real question however is how the term is to be understood in the context of section 28 (4) of the Provincial Insolvency Act. The Act as applicable to all insolvents and nothing turns on the religious profession of the Party. *Prima facie* therefore the Act could not be held to preclude the vesting of property coming to an insolvent by survivorship as member of a joint Hindu family, in the receiver. The question will not arise if the insolvency of a coparcener has the effect of a separation of that coparcener from the joint family of which he is a member. That view is not tenable having regard to the decision in *Noony Suryanarayanamurthi* v. *Noony Veeraraju*[3]. The question therefore reduces itself to one of construction of the term "devolves" in the Act. It is significant that, with reference to the Hindu Law, the Privy Council refers in *Baij Nath* v. *Tej Bali*[4] to inheritance and survivorship as two modes of "devolution." In *In the matter of the Hindu Women's Rights to Property Act*, 1937[5], the term "devolution" in entry 21 of List II of schedule VII to the Government of India Act, 1935, was held by the Federal Court to cover the cases of change in the extent of a person's interest in the property of a joint Hindu family governed by the Mitakshara law by operation of the principle of survivorship. Sir Maurice Gwyer, C.J., observed: "It is equally important to remember that neither in their ordinary grammatical significance nor by a long continued use in a technical sense have the words "devolution" and "succession" acquired a connotation that would preclude their application to describe the operation of the rule of survivorship. Eminent text-writers and Judges have used one or the other of these terms to include the accession of right which takes place on the death of one of the members of a Mitakshara joint family." In the face of the considerations set out, to hold that "both the words in section 28 (4) are very wide words, obviously intended to cover all the ordinary ways in which the estate of the insolvent may be increased from time to time during his insolvency," would—it may be submitted with respect—be a justifiable conclusion.

ANDAL VAIDYANATHAN *v.* ABDUL ALLAM VAIDYA, (1946) 1 M.L.J. 402.

This decision has a larger interest than may appear on its surface. The question to be considered was whether one of the spouses who had married under the Special Mariage Act can by subsequently becoming a convert to Islam obtain a dissolution of the marriage by the processes of Islamic law. In *Rex* v. *Hammersmith, Superintendent Registrar of Marriages, Ex parte Mir Anwaruddin*[6], it was held that a marriage contracted by a Muslim in England with an English woman according to the English forms cannot be dissolved by the husband having recourse to his personal law. Swinfen-Eady, L.J., remarked: "this marriage is not a marriage in the Muhammadan sense which can be dissolved in the Muhammadan manner." It would follow that a marriage contracted under a particular system of law could be dissolved only in the manner provided by that system or by a law to which both the parties would be subject, such as for instance, a statute. An early decision of the Calcutta High Court in *In the matter of Ram Kumari*[7] has held, though *obiter*, that a marriage contracted between two Hindus according to the Hindu rites may on the conversion of one of the parties to Islam be dissolved in the manner indicated by the Islamic law. This principle, if correct, would mean that a relationship created by a bilateral arrangement could be lawfully terminated unilaterally. Indirectly, the policy of the Hindu law which regards marriage as indissoluble and to which the parties had subscribed could be defeated by mere change of religion on the part of one of the spouses. Under the shelter afforded by a system of law to which the

1. (1832) 2 L.J. Ch. 167.
2. (1873) 8 Ch. App. 982.
3. (1945) 1 M.L.J. 292: I.L.R. (1946) Mad. 54.
4. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.).
5. (1941) 2 M.L.J. 12 (F.C.).
6. (1917) 1 K.B. 634.
7. (1891) I.L.R. 18 Cal. 264.

other party is not subject the prior relationship could be nullified. Such a result will not be in consonance with the principles of justice, equity and good conscience. In the case of conversion to Christianity the matter is covered by the Native Converts Marriage Dissolution Act, 1866. No similar cover is afforded by statute in the case of conversion to Islam. The question has therefore to be decided on independent considerations. Islamic law no doubt provides for such dissolution. But Muslim Law is not a territorial law. It may be that if both parties are converted to Islam after a marriage has been contracted by them according to Hindu Law or Christian law, different considerations may operate. But where one of the parties to a non-Muslim marriage alone becomes a Muslim the other party cannot be affected by anything in Islamic law by which such person's marriage could be dissolved. In *Noor Jehan Begum* v. *Eugene Tiscenko*[1] it was held that India is not an Islamic country, that the rule of Muslim law by which a previous marriage could be dissolved by the procedure sanctioned by Muslim law is obsolete, and opposed to the principles of justice and good conscience and therefore cannot be recognised. In that case the marriage was between two Europeans professing Christianity, according to their laws and the marriage was sought to be dissolved by the wife becoming a convert to Islam and having recourse to the procedure prescribed by that law. In *Gnana Soundari* v. *Nallathambi*[2], a Roman Catholic had married a Protestant wife according to the Protestant rites. Later on the wife executed a deed in favour of the husband releasing him from the marriage—a process alleged to be recognised by custom as permissible to bring about a dissolution of marriage. It was held that dissolution of a Christian marriage can take place only in accordance with the provisions of the Divorce Act and not in any other manner. In the case under review also it was held that the marriage could be dissolved only under the Divorce Act as the Special Marriage Act has in terms so provided. It may be pointed out that even where the previous marriage was not between Christians but between Hindus according to Hindu rites the marriage could not be put an end to by one of the parties becoming a Muslim and having recourse to Muslim law. Firstly it should not lie in the power of one party to get out of an obligation to which he had subscribed by unilateral action on his part. Secondly the marriage contracted between the parties not being a Muslim marriage it cannot be dissolved in the manner provided by Muslim law. The Hindu marriage though polygamous is indissoluble. Again it is regarded as a Samskara and not as a contract pure and simple. The Muslim conception is different.

In re NACHIMUTHU GOUNDAN, (1946) 2 M.L.J. 137.

Section 34 of the Penal Code states: "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." Two elements should be established for the section to apply: (*i*) a common intention and (*ii*) an act in furtherance of it. "Common" intention is not the same thing as "same" intention or "similar" intention. Etymologically, "common" from *com*: together, signifies belonging to more than one. It negatives exclusiveness. As applied to intention, commonness presupposes a prior understanding, arrangement, mutual communication resulting in concert. Such an understanding, arrangement or concert may fall to be inferred from the circumstances of the particular case. There is no rule that it should be proved by direct evidence only. In *Mamand* v. *King-Emperor*[3] where three persons were found guilty of murder, there was evidence that the first appellant had feelings of enmity against the deceased; that the second appellant was a younger brother of the first appellant; that the third appellant was their tenant; that all three accused lived at the dera of the first appellant and that after the assault on the deceased all the three accused ran away together. In those circumstances the Privy Council held that the inference was justified that the murder was committed in the furtherance of the common intention of all the appellants and that section 34 would apply. In *Mahbub Shah* v.

1. A.I.R. 1941 Cal. 582.
2. (1945) 2 M.L.J. 80.
3. (1946) 1 M.L.J. 211 (P.C.).

King-Emperor,[1] the Privy Council observed : "Care must be taken not to confuse 'same' or 'similar' intention with 'common' intention; the partition which divides their 'bounds' is often very thin; nevertheless the distinction is real and substantial and if overlooked will result in miscarriage of justice." At another place their Lordships remarked : "It is clear to their Lordships that 'common intention' within the meaning of the section implies a pre-arranged plan and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan." It has already been noticed that such plan or arrangement may form the subject of inference. As regards the words "in furtherance of" in the section, it is clear that they suggest that the common intention should have come into existence prior to the doing of the Act forming the subject of the charge. A tracing backwards from the act stands precluded. The intention should be proved independently of and apart from the Act. *Mahbub Shah's case*[1] leaves no room for any doubt on the matter. Adverting to the observation of the learned Judge in the Court below that "it is difficult to believe that when they fired the shots they did not have the common intention of killing one or more of the complainant party" the Privy Council makes the comment : "It will be observed that according to the learned Judge a common intention to commit the crime came into being when appellant and Wali Shah fired the shots." At another place again the Privy Council remarks : "The learned Judges thought . . . . that with respect to the appellant and Wali Shah it must be held that the common intention . . . . came into being . . . . when they fired the shots." Their Lordships added : "Their Lordships cannot agree with this view." At the same time the Privy Council recognises that "it is difficult if not impossible to procure direct evidence to prove the intention of an individual : in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case." The caution is added that "*the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.*" (italics ours). Three things thus stand clear : (*i*) common intention may form the subject of inference ; (*ii*) it should be established by evidence independent of the Act in question ; and (*iii*) it should be a necessary and not a probable deduction merely from the evidence. In the present case it was found that there was no specific direct evidence to prove that all the accused set out with a pre-arranged understanding that they should kill the deceased and that it was in pursuance of such understanding that the deceased was killed. The evidence however showed that one of the accused said "that they will have to give a sound thrashing to the constable and even finish him" and that it was "after this was said, all the accused belaboured the deceased and even after the deceased fell down all the five of them beat him and left him only after he was dead." The words "finish him" were held to be indicative of the intention to kill and the belabouring of the deceased following thereafter could only be in pursuance of that intention. In view of this conclusion it is rather difficult to follow what appears to be a tacit approval indicated in a later part of the judgment, of the consideration referred to by the District Judge that "when three of them were acting in a frenzied manner and did the various acts, they cannot be said to be premeditated acts." If the act was not premeditated, then would not the case approach *Mahbub Shah's case*[1] where the Privy Council held that "evidence falls short of showing that the appellant and Wali Shah ever entered into a premeditated concert to bring about the murder of Allah Dad in carrying out the intention of rescuing Quasim Shah."

Again in the case under examination, one of the learned Judges remarks in reference to the above Privy Council case : "Their Lordships do not rule out the possibility of a common intention developing in the course of events even though it might not have been present to start with, nor do they say that the intention cannot be inferred from the conduct of the assailants." The latter part of the statement has in fact been recognised by the Judicial Committee in *Mamand's case*[2]. Only it must be remembered that according to the Privy Council, as stated in *Mahbub Shah's case*[1], the inference of common intention should never be made

1. (1945) 2 M.L.J. 144 (P.C.). 2. (1946) 1 M.L.J. 211 (P.C.).

unless it is a *necessary* inference deducible from the circumstances of the case. The inference should be unavoidable and, as the dictionary meaning suggests, it means that the inference cannot be otherwise.

DORAIRAJ *v.* S. R. LAKSHMI, (1946) 2 M.L.J. 318.

This decision is an interesting pronouncement on the right of a putative father to the custody of his illegitimate son born of an exclusively kept concubine. Guardianship is protection to the immaturity of youth, bodily and mental. A guardian is thus one who takes care of another. The duty by which one person stands charged with reference to another to take care of the latter forms the foundation of the right of guardianship. It follows that the right will be enforceable always only with reference to the welfare of the minor. The right is not one for the benefit or personal gratification of the guardian. Nor is it a right sounding in property. In days when parents had the power of life and death over their offspring or the right to deal with them at their pleasure such a colour might possibly have attached to guardianship rights. The institution in all modern systems is regarded strictly from the point of view of the consideration due to the helpless and the weak from their relatives, society and the state. In *Humphreys* v. *Polak*[1], apropos of the right to the custody of an illegitimate child, Stirling, L.J., remarked : "It is, I think clear . . . . that the mother of an illegitimate child is vested by law with rights, one of which is the right *prima facie* to the custody and possession of the child. That right is given to the mother, not for the benefit or gratification of the mother, still less as part of her property, but in order to enable her to discharge the duties which law imposes on her in respect of the infant and for its benefit. That being so, it is impossible that the plaintiff who is the mother of the child should divest herself of those rights in favour of another person." The duty to protect shapes the right. The right is therefore "in the nature of a sacred trust," *Mrs. Besant* v. *Narayaniah*[2]. An illegitimate son is in most systems of law regarded as a *nullius filius*. The mother's right to the custody of the child would therefore be paramount. Among Hindus a restricted right of inheritance and a right to maintenance are recognised in favour of the illegitimate son as against his putative father. Decisions have in the case of a Sudra community regarded him as a member of his father's family, *Vellaiyappan* v. *Natarajan*[3]. Jurists refer to him as being "verily a son" : शूद्रस्यानूढायाऽनियुक्तायामपि-सुत एव. Such being the case could it be argued that the obligation to maintain confers a right on the person liable to the custody of the minor to be maintained ? An affirmative answer seems to be suggested by observations in *Mst. Prem Kuar* v. *Banarsi Das*[4], *Ghana Kanta* v. *Gerali*[5], *Kooverji Devji* v. *Motibai*[6]. This test loses its validity when applied to an illegitimate daughter, who has no right of maintenance recognised as against the putative father. Nor can the right to the custody of the child be correlated to the right of inheritance available to the illegitimate son. The right of inheritance is recognised in particular communities only and hence cannot form the basis of any general rule. Also there are well recognised rights of inheritance which do not carry with them the right to the custody of the person of the heir, as for instance, in the case of the grandfather and grandson. The texts of Hindu Law recognising the heritable capacity of illegitimate sons being special texts forming an exception or proviso to the general law have to be construed strictly and cannot be read as authorising anything in excess of the limited rights expressly conferred. So any assessment of preference in regard to the right to the custody of an illegitimate son can rest only on considerations of the minor's welfare. During the period of nurture there can hardly be (ordinarily) any question of the mother being deprived of the custody of the child, *Venkamma* v. *Savitramma*[7], and In the *matter of Saithri*[8]. The conclusion in the present case that having regard to the fact that the association between the parents of the child

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1. (1901) 2 K.B. 385.
2. (1915) 27 M.L.J. 30 : L.R. 41 I.A. 314 : I.L.R. 38 Mad. 807 (P.C.)
3. (1931) 61 M.L.J. 522 : L.R. 58 I.A. 402 : I.L.R. 55 Mad. 1 (P.C.)
4. (1933) I.L.R. 15 Lah. 630.
5. (1905) I.L.R. 32 Cal. 479.
6. A.I.R. 1936 Sind 63.
7. (1889) I.L.R. 12 Mad. 67.
8. (1892) I.L.R. 16 Bom. 307.

had been for four years only, that the child was only three years of age and that the parents had permanently broken away from each other, the father will have no right to the custody of the child is strictly in consonance with the considerations mentioned above and the rulings on the matter.

MURUGESA GRAMANI *v.* PROVINCE OF MADRAS. (1946) 2 M.L.J. 171.

In this case it is held that section 3 of the Crown Grants Act, 1895, will override the provisions of the Madras City Tenants Protection Act, 1922, and where a lessee of land from Government is bound by the covenant in the lease to yield up the demised premises with the fixtures and additions thereto in good and tenantable repair and condition at the termination of the lease by efflux of time or earlier determination for any other cause, he will not, on forfeiture of his lease on the ground that one of the conditions of the lease had been violated, be entitled to claim the benefits of the City Tenants Protection Act, though under the latter Act a tenant will include one who continues in possession after the termination of the tenancy. The true scope of section 3 of the Crown Grants Act has been explained in two recent decisions of the Federal Court and the Privy Council respectively and in view of those decisions it is doubtful if anything in the terms of a Crown lease can outweigh the provisions of the City Tenants Protection Act, 1922. In *Thakur Jagannath Baksh Singh* v. *The United Provinces*,[1] one of the arguments advanced was that the United Provinces Tenancy Act, 1939, cut down the absolute rights conferred by Crown Grants on the Taluqdars of Oudh in relation to their estates and as such was repugnant to section 3 of the Crown Grants Act and therefore was *ultra vires* the Provincial Legislature. In rejecting the argument, Gwyer, C.J., observed: "The preamble to that Act recites that doubts had arisen as to the extent and operation of the Transfer of Property Act, 1882, and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority, which it was expedient to remove. Certain provisions of general application in the Act of 1882 had been found to conflict with provisions in the sanads and the power of the Crown to impose limitations and restrictions other than those known to the general law had been challenged. Accordingly the Act first provided that every grant or transfer of land by or on behalf of the Crown should be construed and take effect as if the Act of 1882 had not been passed and secondly, that all provisions, restrictions, conditions and limitations over contained in any such transfers or grants should be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature notwithstanding. The words 'provisions, restrictions, conditions and limitations over' must be construed with reference to the purpose of the Act and plainly refer to the course of descent, inheritance, devolution and the like. They cannot refer to such matters as the relations between a sanad-holder and his tenants. Nor could anything in the Crown Grants Act lin it the power of a Legislature to pass such legislation as it thought fit thereafter." On appeal, the Privy Council affirmed this view. It observed: "These general words (the words of section 3 of the Crown Grants Act) cannot be read in their apparent generality. The whole Act was intended to settle doubts as to the effect of the Transfer of Property Act, 1882, and must be read with reference to the general context and could not be construed to extend to the relations between a sanad-holder and his tenants. Still less could they be construed to limit the statutory competency of the Provincial Legislature under the Constitution Act."[2] Two things are made clear: (*i*) The power of the Legislature to pass legislation affecting Crown Grants *after* 1895 is not and could not be controlled by anything in the Crown Grants Act; and (*ii*) the latter Act is intended to deal *only with matters like descent, inheritance and devolution*. The Madras City Tenants Protection Act is admittedly a later enactment. It does not deal with the particular topics which are the objects of protection of the Crown Grants Act. It may therefore be that in the light of these considerations the question may require to be more fully examined.

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1. (1943) 2 M.L.J. 114, 120 (F.C.). 2. (1946) 2 M.L.J. 29 (P.C.).

VERGHESE VAIDYAR *v.* REX, (1947) 1 M.L.J. 2.

This is an interesting decision dealing with the conditions necessary for the exercise of the power to arrest without a warrant under section 54 (7) of the Code of Criminal Procedure. Under that provision a police officer is authorised ' to arrest without a warrant any person who has been concerned in or against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists, of his having been concerned in any act committed at any place outside British India, which if committed in British India, would have been punishable as an offence and for which he is under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in British India." Two requisites have to be satisfied before the power could be exercised: (*i*) credible information must have been received of the commission of an act outside British India which if done in British India would be an offence and (*ii*) that the person who committed the act would under any law relating to extradition, etc., be liable to be apprehended in British India. The question is whether the expression " for which he is under any law . . . . liable to be apprehended or detained in British India " qualifies only the offence and denotes its character for which there may be such a liability or whether it indicates a present liability for apprehension or detention, *i.e.*, a liability to be arrested without warrant if the offence had been committed in British India itself. It must be taken that the framers of the Code did not intend to confer on policemen in such cases, greater powers than what would be available had the offence been committed in British India. To hold otherwise may give rise to anomalies. To take an example, if information of a credible character is received that a person has committed forgery in an Indian State and has fled into British India, the alleged offence is one in regard to which the police officer cannot arrest without warrant if it had been committed in British India. But simply because it is committed in an Indian State could the British Indian police arrest him on the ground that forgery is an extraditable offence? Would it not add to the anomaly if the State in question was one where the provisions of the Criminal Procedure Code applied? Or again mere receipt of credible information carries with it no guarantee that any proceedings are intended to be taken against the alleged offender who has fled into British India and in such a case the arrest would have been altogether idle and mischievous. These considerations impelled Mukherji, J., to hold though *obiter* in *Subodh Chandra Roy Chowdhury* v. *Emperor*[1], that the person should be one liable to be arrested without a warrant if the offence had been committed in British India. The difference in the language employed in clause *firstly* to section 54 and clause *seventhly* is also noteworthy. While the former clause refers to cognisable offences the latter clause includes all acts which amount to offences provided only that they are offences for which there is a liability for apprehension or detention. In the case under review Horwill, J., dissents from the conclusion reached by Mukherji, J., but that again is only *obiter* inasmuch as he finds with reference to the charges against the alleged offender that " if such offences had been committed in British India, there can be no doubt that the petitioner could have been arrested by the police without a warrant." The matter is an important one and it is desirable that the doubt should be set at rest.

KASIVISWANATHAN CHETTIAR *v.* SOMASUNDARAM CHETTIAR, (1947) 1 M.L.J. 43 (P.C.).

This is a decision of the Privy Council affirming the validity of a custom in so far as the parties to the suit and those claiming under them are concerned but not so as to affect other parties. In this case the custom set up was that among Nattukottai Chettis a son can be adopted to a person after his death and after the death of his widow by his father or other pangalies. In accepting the concurrent

1. (1924) I.L.R. 52 Cal. 319.

findings of the trial Court and the High Court, the Privy Council laid down the position indicated above. In the High Court, Krishnaswami Aiyangar, J., had stated :[1] "In view however of the scanty evidence on which the finding has been arrived at we desire to qualify our decision by stating . . . . . that the effect of the decision is to be confined to the particular circumstances of the present case and that it should not be regarded as a satisfactory precedent if in any future instance among other members of the community fuller evidence regarding the existence or non-existence of the alleged custom should be forthcoming." These remarks are more or less adopted by the Privy Council on appeal where their Lordships remark : "However having regard to the scanty nature of the evidence and the limited number of instances of a comparatively recent date in support of the custom, their Lordships would add . . . . . that this decision would only bind the parties to the suit and those claiming through them, and that it should not be considered a satisfactory precedent if in any future instances among other members of the community fuller evidence regarding the existence or non-existence of the custom should be forthcoming." Both the High Court and the Privy Council rely for such a limited affirmation of a custom set up on behalf of a community or class on the decision of the Judicial Committee in *Chiman* v. *Harichand*[2]. That was also a case of adoption. The parties were Agarwal Banias of Zira in the Punjab. The suit was for the declaration of the validity of an adoption. The adoption had been made of a boy who at the time of adoption was an orphan and already married. It was found that the Hindu Law of adoption was not applicable to the community. A custom was set up that amongst that class an unequivocal declaration by the adopting father that a boy had been adopted and the subsequent treatment of the boy as an adopted son would be sufficient to constitute a valid adoption. In accepting the concurrent findings of the Courts below, their Lordships had observed: "The evidence . . . . . . appears to their Lordships to have been somewhat limited, but their Lordships consider that, as between the parties to this suit and to this appeal and those claiming through or under them, that evidence was sufficient to entitle the Chief Court and the Divisional Judge to find that the adoption was valid. Their Lordships however consider that the present case, owing to the limited nature of the evidence as to custom among the Agarwal Banias of Zira, would not be a satisfactory precedent if in any future instance among other parties fuller evidence regarding the alleged custom of the Agarwal Banias of Zira should be forthcoming." In effect all these decisions recognise the special customs of a family, a feature unknown to the early Hindu Codes, for according to them no family as a family could have laws of its own. In the case under notice and the decision which it follows the alleged custom is set up as a class custom but fell to be recognised as one followed in the particular family only. In *Maharajah of Venkatagiri* v. *Rajarajeswara Rao*[3], it was held that the fact that among some families provision has been made for the maintenance of illegitimate children of members of their families cannot be regarded as sufficient to prove a similar custom among other families belonging for instance to a different sub-caste. It would thus seem that the custom set up in the present case may not have any appreciable evidentiary value.

PROVINCE OF BOMBAY *v.* MUNICIPAL CORPORATION, BOMBAY, (1947) 1 M.L.J. 45 (P.C.).

It is a hallowed maxim : *Roy n'est lie per ascun statute si il ne soit expressment nosme*—The king is not bound by any statute if he be not expressly named to be so bound. Either he must be expressly named, or there must be equivalent words or the prerogative must be included by necessary implication. The reason for the rule is given by Alderson, B., in *Attorney-General* v. *Donaldson*[4]. The learned Judge said : "for it is inferred *prima facie* that the law made by the Crown, with the

1. (1943) 1 M.L.J. 195, 197.
2. (1913) L.R. 40 I.A. 150 : I.L.R. 40 Cal. 879 (P.C.).
3. I.L.R. (1939) Mad. 622 : (1939) 1 M.L.J. 831.
4. (1842) 10 M. & W. 117 at 124 : 152 E.R. 406 at 409.

assent of the Lords and Commons, is made for subjects and not for the Crown." To bind the Crown therefore the intention of the Legislature should be clearly and unmistakably expressed, *Wheaton* v. *Maple & Co.*[1]. The above maxim fell to be invoked in the present case with reference to the exercise of powers by the Commissioner of the Corporation of Bombay under sections 265 and 222 (1) of the City of Bombay Municipal Act for the purpose of laying water main in a private road belonging to the Government for the convenience of the people living in a locality in the vicinity of the road. It was contended by the Government that the powers given to the Commissioner under sections 265 and 222 (1) cannot be exercised against Government property. In regard to the maxim quoted above it has been recognised that where a statute is intended to give a remedy against a wrong the king though not named will be bound, *Willion* v. *Berkeley*[2]. It has also been recognised that the king is impliedly bound by a statute passed for the public good, the preservation of public rights, suppression of public wrongs, relief of the poor, advancement of learning, religion and justice or for the prevention of fraud, *Magdalen College case*[3]. In the case under review, it is accepted that the early law was that the king will be bound by a statute if its object was to promote the public good. The high authority of Lord Dunedin in *Magistrates of Edinburgh* v. *The Lord Advocate*[4], is available for the proposition. He had observed : "When you come to a set of provisions in a statute having for its object the benefit of the public generally, there is not an antecedent unlikelihood that the Crown will consent to be bound." In the present case it is pointed out that however true this position might be in Scottish law, so far as England is concerned, the principle has not been fully accepted. Reliance was placed on the recent decision in *The Attorney-General* v. *Hancock*[5] wherein is cited a series of decisions in which the Crown was held not to be bound notwithstanding the fact that the statute in question was clearly for the public benefit. Another decision which was considered to be very much in point was *Gorton Local Board* v. *Prison Commissioners*[6] where it was held that a by-law made under the Public Health Act of 1875, which was admittedly an enactment designed to safeguard the health of the public, will not bind the Crown so as to give a local board any control over one of His Majesty's prisons. The Privy Council also points out that the test of public benefit is not satisfactory because every statute must be presumed to be for the benefit of the public. Accordingly it is stated that the principle that the Crown should be deemed to be bound by a statute if the latter was for the public good cannot be regarded as sound except in a strictly limited sense. The Judicial Committee also emphasises the fact that on this matter the law in India is the same as the law in England. In the circumstances of the present case it was held that the powers conferred by sections 265 and 222 (1) of the City of Bombay Municipal Act cannot be exercised against the Crown.

ZEMINDAR OF DEVAKOTTA *v.* JYOTI VENKADU, (1947) 1 M.L.J. 57.

In this case the question fell to be decided whether in respect of lands originally dry on which wet cultivation was subsequently carried on with the help of water available from the introduction of the Krishna river anicut system and the excavation of connecting irrigation channels—the system not belonging to the landholder and he not having executed any improvements in regard to the lands—wet rates of rent can be charged by the landholder. There was also the further question whether assuming that such rates had been paid for a long time without demur by the ryot prior to the passing of the Estates Land Act a presumption of a contract to pay at those rates could be drawn. No doubt section 27 of the Estates Land Act lays down that if a question arises as to the amount of rent payable by a ryot in any revenue year he shall be presumed until the contrary is shown to hold at the same rate as

1. (1893) 3 Ch. 64.
2. Plowd. 239, 244.
3. 11 Rep. 70-b.
4. (1912) S.C. 1085.
5. (1940) 1 K.B. 427.
6. (1904) 1 K.B. 165 (n) at 168.

of presuming the agreement and the consideration th
a contract, the Court should not be governed by tha
to the conclusion on all the circumstances of the case
consideration cannot be drawn if circumstances tend
any consideration for the enhanced payment. In oth
of fact in the circumstances of each case whether the
existence of consideration for such a contract should
Sri Raja Bommadevara Chayadevamma v. *Venkataswamy*[4]
should be drawn only in relation to the facts of the sp
evidence in that case to which they might be appli
learned Judge held that the circumstances did not wa
a presumption. On the question whether even if enb
before the passing of the Estates Land Act it could b
date, the decision in *Srimath Mallikarjun Prasad Naidu*

It is difficult to agree that there is any such broad presumption." In *Dorayya* v. *Mangamma*[1], properties had been allotted at a partition effected by the father among his sons, to his daughter who became widowed when she was eleven years old and had ever since been living with her father and under his protection. She was given an equal share. There was however no document executed by way of gift in her favour. She had no children. The question as to the nature of the interest she took fell to be considered. Varadachariar, J., took the view that she took only a limited estate. The fact that she had no children, that a maintenance provision for her had to be assured and that she was allotted an equal share were all according to him pointers to the fact that the intention was that she was only to enjoy the properties during her lifetime but shall not have absolute rights. The learned Judge also pointed out that in that case it was not a question of the construction of any document either. It may be suggested that the inference is not quite warranted. In *Jogeshwar Narain* v. *Ramchandra*[2], bequests to a wife and son had been made in the same terms and the same interest had been limited and the Privy Council held that both of them will take an absolute interest. In *Mangamma* v. *Dorayya*[3] the view of Varadachariar, J., was upheld, but in doing so, the learned Judges were largely influenced by the ruling in *Mahomed Shumsool* v. *Shewakram*[4]. They observed that the " general rule in the case of a gift made to a Hindu female by her male relations is that in construing a deed of such gift the Court is entitled to assume that the donor intended the donee to take a limited estate only unless the contrary appears from the deed." It is rather curious that such a presumption should still be invoked having regard to the principle underlying section 8 of the Transfer of Property Act after its amendment in 1929, since which date the section is applicable to Hindus also. The learned Judges went on to add : " It is not seriously contended that the rule if applicable when there is a grant in writing is inapplicable when there is no grant in writing as in this case." One may pause to comment that while Varadachariar, J., pointed out that the case not being one where there was a document to be construed there was no room for the application of principles relating to construction of grants, the learned Judges in Letters Patent Appeal seem to regard the same principles to be applicable whether there was a document or not. In *Rameshwar Baksh Singh* v. *Arjun Singh*[5], the holder of an impartible estate had granted a village for " maintenance." On a question as to the character of the estate that passed to the grantee the Judicial Committee held that, in the circumstances of the case, a life estate only was taken. It may be noted that the grantee was a male. It would follow therefore that the sex of the grantee is immaterial, and that a grant for maintenance, the purpose being particularly pointed out, may operate as a life grant only. That however affords no warrant for drawing the wider conclusion that wherever a grant presumably for maintenance is made it would convey to the grantee a life estate only. The ruling of the Privy Council in *Jogeshwar Narain* v. *Ramchandra*[2] illustrates the position. There the grant was expressly stated to be " for your mintenance " and still it was held that the legatee took an absolute estate. Lord Watson remarked : " These words are quite capable of signifying that the gift was made for the purpose of enabling them to live in comfort and do not necessarily mean that it was to be limited to be a bare right of maintenance." In *Nandlal* v. *Sundarlal*[6], the Allahabad High Court has held that where the grant was to a widow described to be for maintenance and residence there being no reference to her heirs or legal representatives she would take a life estate only in the property. In the present case, it is not clear whether there was a separate document, whether the purpose of the grant was particularly set out and what other circumstances were present. It is recognised by the learned Judge that the allotment of property absolutely in lieu of maintenance was not unknown to Hindu Law. The decision in *Ramachandra Naicker* v. *Vijayaraghavalu*[7] is noticed but the comment

1. (1935) 69 M.L.J. 320.
2. (1896) 6 M.L.J. 75 : L.R. 23 I.A. 37 : I.L.R. 23 Cal. 670 (P.C.).
3. (1936) 71 M.L.J. 688.
4. (1874) L.R. 2 I.A. 7 (P.C.).
5. (1900) I.L.R. 23 All. 194 : L.R. 28 I.A. 1 (P.C.).
6. I.L.R. (1943) All. 892.
7. (1908) I.L.R. 31 Mad. 349.

is made that "it is the exception rather than the rule." There seems to be little warrant for this last conclusion. It may be that if the grant were a Crown grant different considerations may operate and the purpose of the grant would be relevant to determine the rights of the grantee. In *Secretary of State* v. *Srinivasachariar*[1] it was remarked in considering the question whether the grant in that case conferred on the grantee the right to quarry minerals : "Nor does the language suggest that any further benefit to the grantee was contemplated or intended than such as might be derived from the ordinary use of the land for the purpose of cultivation. It was not a complete transfer for value of all that was in the grantor . . . . . and the purpose of the grant was to ensure the subsistence of the grantee by the appropriation to his use of the produce of the seasons each year." In the case of a private transfer the principle of section 8 of the Transfer of Property Act would give the grantee in the absence of a reservation, express or necessarily implied by the document, all the rights of the transferor.

MANILAL BHAICHAND v. MOHANLAL MAGANLAL, I.L.R. (1945) Bom. 899.

A question of considerable importance concerning the exemption from attachment under section 60, Civil Procedure Code of the salary and dearness allowance of a clerk in a private mill fell to be decided by the Bombay High Court in the above case. It was held that the dearness allowance drawn by an employee of a private concern would not be exempt from attachment. It was further held that a clerk in a private mill cannot be regarded as as a "labourer" within the meaning of section 60 whose salary could not be attached. In the case in question, a suit for recovery of money had been instituted prior to the 1st June, 1936, and had resulted in a decree in August, 1937. The debtor was employed in a private mill and was drawing a salary of Rs. 62 per month with a dearness allowance of Rs. 43. A notification of the Government of India No. 1480-D/43 Home Department, dated 29th April, 1943, exempted from attachment any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority which the appropriate Government may by notification in the official gazette declare to be exempt from attachment. It is clear that the notification cannot apply to dearness allowance paid to employees of private persons or bodies. Also section 60 (1) (*l*) clearly exempts from attachment only the allowances of Government servants and employees of a railway company or local authority. The question then remained whether the judgment debtor could be regarded as a "labourer" within the meaning of section 60 (1) (*h*). The meaning of the term "labourer" is one that is often felt than defined. Various tests have been propounded and have been the subject of criticism. The ordinary dictionary meaning is that a labourer is a person "doing for wages work that requires strength or patience rather than skill or learning." A slightly different definition is that a labourer is one who "does work requiring little skill." Under such a test it is conceivable that a rope-walker or performer at a circus will not be a labourer because considerable skill is required on the part of the person concerned in such cases. If the "skill" that is contemplated as lifting a person outside the category of labourers is intellectual skill, then it may be that a great dancer or skater or musician would find himself in the ranks of labourers. Wharton's Law Lexicon suggests that a labourer is a person engaged in digging or doing other useful productive work with his hands. A farmer has been held not to be a labourer within the meaning of the Sunday Observances Act, 1677, while the driver of a motor bus has been considered to be a labourer, *Morgan* v. *London General Omnibus Co.*[2], *Smith* v. *Associated Omnibus Co.*[3]. But doing of manual work is also not a satisfactory test. In In re *National Health Insurance Act*, 1924 : In re *Professional Players Association Football*[4], it was held that professional footballers are not labourers in spite of the fact that playing football is mostly manual labour. In *Jechand Khusal* v. *Aba*[5] Melvill, J., defined a labourer as a person

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1. (1920) 40 M.L.J. 282 : L.R. 48 I.A. 56 : I.L.R. 44 Mad. 421 (P.C.).
2. (1884) 13 Q.B.D. 832.
3. (1907) 1 K.B. 916.
4. (1924) 2 K.B. 265.
5. (1880) I.L.R. 5 Bom. 132.

who "earned his daily bread by personal manual labour or in occupations which required little or no art or skill or previous education." In other words the occupation in which the person is engaged should be one involving either wholly or substantially physical labour. Skill in any appreciable degree should not be required. In that view a carpenter, mason or tailor, would be not a "labourer" but an artisan. An acrobat or singer or cricketeer would be an artiste. If this test is satisfied it is immaterial in whatever manner the remuneration falls to be determined. Thus a spinning operative at a mill will not be any the less a labourer because the amount of remuneration payable to him depends, for instance, upon the number of pounds of cotton spun. In *Kulkarni* v. *Ganpat Hiraji*[1], it is pointed out that a person would be regarded as a labourer if he is expected to do that class of work which requires manual labour. All these tests if applied to the present case may yet not produce a satisfactory conclusion. A clerk admittedly requires patience. Clerical work involves also a lot of manual labour. It is not always that much skill or training or previous special education is needed. For instance, where it is the duty of a clerk merely to copy into the registers documents presented for registration it may plausibly be argued that the work is almost mechanical. On that line of argument the clerk may not be anything else but a labourer. At the same time there are clerks doing other types of work where skill in an appreciable degree is needed. To classify such clerks as labourers would be altogether unwarranted. It therefore seems that whether a clerk can be regarded as a labourer within the meaning of section 60 (1) (*h*) must depend upon the nature of the work he does and the facts of the particular case. If the decision in the present case is intended to suggest that every time a clerk is to be regarded as not being a "labourer," it may, with respect, be submitted that the proposition would be rather wide.

SOONDERDAS THAKERSAY *v.* BAI LAXMIBAI, I.L.R. (1945) Bom. 1047.

The question whether the provisions of section 10 of the Limitation Act will apply to a case where shares standing in the name of one person were declared by the Court to belong to other persons, on the footing that the former should be regarded as holding as an express trustee for the latter, was answered in the negative in this decision. Section 10 applies where property is vested in trust for any specific purpose. The marginal note to the section refers to "express trustees and their representatives." In *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*[2] the Privy Council has defined a trust for a specific purpose as one for a purpose that is either actually and specifically defined in the terms of the will or the settlement itself or a purpose which from the specified terms can be certainly affirmed. In *Cunningham* v. *Foot*[3] Lord Cottenham referred to an express trust as a trust which arises upon a construction of a written instrument not upon any inference of law imposing a trust upon the conscience. As to who an express trustee is, it has been stated that it must appear either from express words or clearly from the facts that the author of the trust has entrusted the property to the trustee for the discharge of a particular obligation, *Barkat* v. *Daulat*[4]. In the present case, partnership funds were applied for the purchase of certain shares, but the shares were purchased in the name of one of the members. Long after, in a suit for the dissolution of the partnership brought by the other members, a decree resulted which declared the plaintiffs to be entitled to the assets, outstandings, claims and books of account of the firm. In a still later suit for a declaration that by virtue of the decree *inter alia* the shares in question should be deemed to have been held in trust by the person in whose name the shares stood, the question of limitation was raised. Applying the definitions of "trust for a specific purpose" and "express trust," it is clear that in the present case there is no such trust. The trust that arose was only a *quasi* or constructive trust or a trust by operation of law. *Prima facie* to such a trust the terms of section 10 cannot apply. Section 80 of the Indian Trusts Act makes it clear that a *quasi* trust is only

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1. I.L.R. (1942) Bom. 287.
2. (1921) L.R. 49 I.A. 37, 43 (P.C.).
3. (1874) 3 A.C. 974, 984.
4. (1882) I.L.R. 4 All. 187, 189.

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PIROJO GHADIALI *v.* PESTONJI GHADIALI, (1946) 48 Bom.L.R. 36.

Section 137 of the Evidence Act provides that the examination of a witness by the adverse party shall be called his cross-examination. Section 138 in prescribing the order of examination states that witnesses shall be first examined-in-chief and then cross-examined if the adverse party so desires. The section does not, however, make special provision for cross-examination by co-defendants. In English law the rule seems to be that any party is entitled to cross-examine any other party or his witnesses in the same litigation, and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination[1]. It is a well known principle that all the evidence taken in a case, whether in chief examination or cross-examination is common and open to all the parties, *Lord* v. *Colvin*[2]. It would therefore follow that the party against whom it is proposed to be used should have had an opportunity to cross-examine. Hence the right of a defendant to cross-examine a co-defendant is according to the English cases unconditional and not dependent on the fact that the cases of the defendants are adverse or that there is an issue between the defendant and his co-defendants, *Allen* v. *Allen*[3]. In the case under notice, the question arose whether there would be such a right of cross-examination where the interests or contentions of the co-defendants are identical. In *Allen* v. *Allen*[3], it was held that in a divorce suit the evidence of the respondent would not be admissible against a co-respondent, if the latter had not been allowed to cross-examine upon it. In that case, the respondent had made statements which conflicted with those made by the co-respondent in regard to the same matter. The learned Judge in the present case distinguished it on that ground and followed the statement in Phipson on Evidence[4]: "The same right (*i.e.*, the right to cross-examine) exists between respondent and co-respondent in divorce cases, provided either is *hostile* to the other, for if friendly, *e.g.*, where both deny the adultery, each can only be examined as the other's witness and not cross-examined." The learned Judge accordingly held that it is only where the evidence of the co-defendant is hostile to the defendant that he can claim the right to cross-examine. The ruling does not seem to be in consonance with the position definitely suggested in *Allen* v. *Allen*[3], that the right to cross-examine is unconditional and not dependent on the fact whether the cases of the defendants are adverse to each other and therefore deserves fuller consideration.

DESHPANDE *v.* ARVIND MILLS CO., (1946) 48 Bom.L.R. 90.

An interesting point concerning contracts of service fell to be expounded in this case. It was held that an agreement of service containing a negative covenant preventing an employee from working elsewhere during the period covered by the agreement will not be opposed to section 27 of the Indian Contract Act, and that the stipulation is enforceable even if the employee has quit the service during the term. It is well settled that agreements which restrain an employee's freedom after the period of service are absolutely void, *Oakes & Co.* v. *Jackson*[5], *Brahmaputra Tea Co.* v. *Scarth*[6]. The question of the validity of such an agreement with reference to the period of service has fell to be examined in cases where injunctions were sought to restrain the employee from taking service elsewhere. In *Madras Railway Co.* v. *Rust*[7], the defendant had agreed to serve in India under the plaintiff for a period of four years on a penalty of £ 100. After serving for two years the defendant left the plaintiff's service for another employer. It was held by Handley, J., that an interlocutory injunction may be issued, to restrain him from doing so. It was pointed out by the learned Judge that under section 57 of the Specific Relief

1. Halsbury's Laws of England, 2nd edn., vol. 13, s. 831, p. 756.
2. (1855) 3 Drewry 222 : 61 E.R. 888.
3. (1894) P. 248, 253, 254.
4. 7th edn., p. 458.
5. (1876) I.L.R. 1 Mad. 134.
6. (1885) I.L.R. 11 Cal. 545.
7. (1890) I.L.R. 14 Mad. 18.

Act, in the case of an affirmative agreement coupled with a negative covenant, express or implied, an injunction may be granted though specific performance cannot be ordered and that the section gives as illustrations cases where specific performance is refused by section 21 (*b*). The learned Judge observed that if injunction can be granted where specific performance is refused by section 21 (*b*) there is no reason to deny one where specific performance is refused by section 21 (*g*). In *Subba Naidu* v. *Haji Badsha Sahib*[1], a similar view was taken by White, C.J., and Benson, J. The Chief Justice remarked: "Mr. Grant's proposition of law is that section 57 applies only to the case of contracts which are specified in section 21, clause (*b*). In other words, he says that section 57 only applies to cases which I may describe compendiously as cases like *Lumley* v. *Wagner*[2]. There is certainly nothing in the words of section 57 to suggest that so narrow a construction should be placed upon it." In *Charlesworth* v. *Macdonald*[3], it was held that an injunction can be granted to restrain an employee during the currency of the period of his service from seeking employment elsewhere. In that case the plaintiff, a physician practising at Zanzibar had taken the defendant as an assistant for 3 years on certain terms, with the ordinary clause against practising. At the end of one year the defendant left the plaintiff's service due to disagreement and started practising at that place independently. Farran, C.J., in granting an injunction observed: "Is it an agreement in restraint of trade? I think not. I do not think that an agreement of this class falls within the section. If it did, all agreements for personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for any one else than the person with whom he so agrees. It can hardly be contended that such an agreement is void. In truth a man who agrees to exercise his calling for a particular wage and for a certain period agrees to exercise his calling and such an agreement does not restrain him from doing so. To hold otherwise would, I think, be a contradiction in terms. . . . . . . Illustration (*d*) to section 57 is what I may call a legislative decision to the same effect". In *Pragji* v. *Pranjiwan*[4], the matter was stated as follows: "The section extends to agreements of a negative character such as are necessarily implied from contracts for wholetime service, even if not expressed therein, and the operation of such contracts as contracts of service, appears in such cases to prevent the application of section 27 of the Contract Act to such negative agreements so far as they purport to impose restrictions only during the period of affirmative agreement for service." The Calcutta High Court also has taken a similar view of the matter. In *Burn & Co.* v. *McDonald*[5], a person had been employed by Burn & Co., Calcutta, a firm of engineers for a term of five years. The agreement had provided *inter alia* that "he should diligently and to the best of his ability devote himself to the duties incumbent on him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm." While the period was still running he quit the service of the firm and accepted employment with another. In contending that no injunction could issue, reliance was placed on certain observations in the judgment in *Whitwood Chemical Co.* v. *Hardman*[6], which had been followed in *Ehrman* v. *Bartholomew*[7]. In the first of these cases Lindley, L.J., had observed: "Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do, but it does not at all follow that because a person has agreed to do a particular thing he is therefore to be restrained from doing everything else which is inconsistent with it." It was recognised by the Judges of the Calcutta High Court that these observations might have caused difficulty ordinarily in regard to the issue of an injunction but that the answer thereto so far as India was concerned was to be found in section 57 of the Specific Relief Act. The learned Judges also held that

1. (1902) 13 M.L.J. 13 : I.L.R. 26 Mad. 168.
2. 1 D.M.G. 604.
3. (1898) I.L.R. 23 Bom. 163.
4. (1903) 5 Bom.L.R. 878.
5. (1909) I.L.R. 36 Cal. 354.
6. (1891) 2 Ch. 416.
7. (1898) 1 Ch. 671.

any argument that the issue of an injunction would be an indirect way of enforcing a covenant for personal service would not be tenable in view of illusration (*d*) to the section. The Indian decisions thus have consistently held that a contract of exclusive service implies an undertaking not to work elsewhere during the period of service, that any undertaking given in that behalf would not be in restraint of trade or repugnant to section 27 of the Contract Act, that acceptance of service elsewhere during the period covered by the agreement of service can be restrained by an injunction and that it would make no difference even if a penalty had been stipulated or if the party had quit the service of his employer while the latter was still willing to keep him in service.

To the rules so stated there are one or two exceptions. These are cases where the employment is only part-time and therefore not exclusive or where the service has been terminated by methods provided in the contract of employment itself in that behalf. In *Ehrman* v. *Bartholomew*[1], a person had accepted service as a travelling agent to a firm of wine merchants for a period of ten years and had agreed to devote his whole time and attention to the business of the merchants. After one year, however, he left the plaintiff's employment and took service under another. It was found that under the contract the employer could have terminated the service of the agent after one year at any time by three months' notice in writing, but the employee had not been given any corresponding right. In the circumstances the injunction was refused. In *Mason* v. *Provident Clothing and Supply Company Limited*[2], the finding was *inter alia* that the employee was a part-time employee. In the present case, the employee had engaged to serve as weaving master for a period of three years exclusively under the second respondent, but after one year quit the latter's service and accepted employment with another. An injunction was issued to restrain the appellant from doing so. The conclusion is one which, it may be submitted, is in accordance with the trend of decisions in India.

RAMAKRISHNA RAO *v.* KRISHNA RAO, (1947) 1 M.L.J. 75.

In this case it was held that the inherent jurisdiction of the Court could not be invoked where there is no question of enforcing any specific statutory obligation arising under the Companies Act. It was also held that there is nothing in the Act to vest the Company Court with an exclusive jurisdiction in all company matters. In the present case, a person claiming to have been elected as Secretary of a company sought to recover, through an application filed under section 3 of the Companies Act, the books, papers etc. of the company which the respondent was in possession of as the former Secretary of the company, the latter having already filed a suit in the court of the District Munsiff at the place of office of the company for a declaration of the invalidity of the very meeting which had been convened by certain shareholders of the company for the election of office-bearers and at which the applicant had beeen elected in fact as Secretary. It will hardly be disputed that the Secretary will be entitled to have custody of the property of the company. That however presupposes that the person claiming to be the Secretary had been validly elected. If the validity of the election is disputed and the property of the company is withheld he has the remedy of a suit. The question is whether in such a case there is infringement of any statutory right given to such a person under the Companies Act. In *British India Corporation Ltd.* v. *Robert Menzies*[3], *M* was a share-holder of the corporation. He joined the corporation in 1920 as Secretary and in March 1930, he was in addition to his duties as Secretary appointed to act as Managing Director. He held the positions till 1935, when he went on leave to England. During his absence, he was informed that his services had been terminated on account of retrenchment etc. *M* returned in the autumn and applied to the corporation for a copy of the register of the members. The corpora-

1. (1898) 1 Ch 671.
2. (1913) A.C. 724.
3. (1936) I.L.R. 58 All. 988.

where the law requires something to be done there must be in existen
that can directly order it to be done. It is well understood in all syste
lised jurisprudence that where there is a right there is a remedy". In
case, it is pointed out that the right of the Secretary to the property c
pany is not a special statutory right and that where the Act has not laid
particular mode of enforcement of the right it is in the ordinary courts
the remedy will have to be sought[1]. In *Davies* v. *Gas Light & Coke C*
held that the right given to a share-holder by section 10 of the Compan
Consolidation Act, 1845, to require the company to supply him with a c
shareholders' address book is a private right conferred on him by statute
of his being a member of the company and not as as a member of the
was also held that if the company refused to give him a copy, the prop
is to seek an injunction against the company or to apply for a writ of
or mandatory injunction. In the Allahabad case it was however conte
a mandatory injunction could be obtained only in a suit. The argu
rejected on the ground that the company court had exclusive jurisdict
matter and that a suit for injunction could not therefore lie in any ot
As pointed out in the present case there seems to be no warrant for this vie
s no provision in the Companies Act which gives the company court

dence for any purpose and the matter seems still to require clarification. So far as Madras is concerned it is unnecessary to go earlier than the decision of the Full Bench in *Ramayya* v. *Achamma*[1]. In that case a suit had been brought by a widow for ejectment and for recovery of possession of certain properties which had according to her been in the enjoyment of her husband as the result of a partition between him and his kinsmen and which had been trespassed upon and taken possession of by the latter on her husband's death. To succeed in the action the widow had to prove her husband's title to the particular items of property. In other words, the terms of the partition had to be made out. It was found that a partition had taken place and that in that connection a document had been drawn up and signed but not registered. It was held that the deed was inadmissible in evidence by reason of sections 17 and 49 of the Registration Act and no oral evidence can be given of its terms by reason of section 91 of the Evidence Act. It was further pointed out that the change in the character of the properties not having been proved, they should be deemed to continue as joint family property and hence no action on the footing of a trespass can be maintained by one of the members as against other members. The decision of the Privy Council in *Varada Pillai* v. *Jeevarathnammal*[2] was held to have no bearing as that case only decided that certain documents not amounting to a conveyance by way of gift and not registered could be looked into for the purpose of ascertaining the nature of the possession held in regard to the property, whether it was in his own right and not as trustee or manager. Subsequent to the Madras Full Bench decision there came the ruling of the Privy Council in *Ram Rattan* v. *Parma Nand*[3]. There, a suit for general partition had been brought by the plaintiff in December, 1939, alleging that the family had till then remained joint. One of the defences was that there had been a division by metes and bounds of the bulk of the family properties earlier in the year in March 1939. One of the issues framed by the trial Court was whether the suit "in the *present form* does not lie." In dealing with it the Privy Council referred to it as follows: "the important question is whether partition had been effected before the institution of the suit in December 1939". The question therefore was one concerning the *factum* of partition prior to the suit. Two documents were sought to be used to corroborate the oral testimony. Being unstamped and unregistered the Privy Council held that apart from any question as to the effect of sections 17 and 49 of the Registration Act, the wider prohibition imposed by section 35 of the Stamp Act would operate and the documents cannot be looked into for *any* purpose. The Judicial Committee however held that on the oral evidence the partition prior to the suit that was set up was proved. It is thus clear that the oral evidence was allowed not for proving the terms of the partition embodied in the inadmissible documents but to prove the existence or otherwise of a partition. So viewed in the background of the special facts of the case the decision of the Privy Council does not in any way militate against the correctness of the Madras Full Bench decision. In *Koyatti* v. *Imbichi Koya*[4], however, Somayya, J., observed as follows: "The Judicial Committee did not refer to the difficulty of admitting other evidence when the transaction was admittedly reduced to writing and that writing was inadmissible either under section 35 of the Stamp Act or under sections 17 and 49 of the Registration Act. But there is no doubt that the Judicial Committee had no difficulty in finding a partition on other evidence. But whether other evidence is admissible to prove the details of the partition is still open to doubt. It is not clear whether oral evidence was accepted only in proof of the division in status or to prove the details of the partition. When the question directly arises hereafter in this Court, we may have to consider whether the Full Bench decision in *Ramayya* v. *Achamma*[1] is good law after the decision of the Judicial Committee." It may be pointed out that a careful analysis of the

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1. (1944) 2 M.L.J. 164 : I.L.R. (1945) Mad. 160 (F.B.).
2. (1919) 38 M.L.J. 313 : L.R. 46 I.A. 285 : I.L.R. 43 Mad. 244 (P.C.).
3. (1946) 1 M.L.J. 295 : L.R. 73 I.A. 28: I.L.R. (1946) Lah. 63 (P.C.).
4. (1946) 1 M.L.J. 454.

facts and issues in the Privy Council case show but little cause for the doubt engendered. In *Thammayya* v. *Sathamma*[1], it seems to have been held by Chandrasekhara Ayyar, J., following the Full Bench decision and distinguishing the Privy Council case that, where the partition list is inadmissible in evidence for want of registration, oral evidence cannot be permitted to prove the partition. In the present case the learned Judges remark *apropos* of the doubt raised by Somayya, J.,: "We do not share the learned Judge's doubts." They then explain why the Privy Council in *Ram Rattan's case*[2] made no reference to the Madras Full Bench decision to which its attention was in fact drawn or to section 91 of the Evidence Act: "As section 91 of the Indian Evidence Act excludes oral evidence only in proof of the terms and not of its existence as a fact, of a contract, grant, or other disposition of property, no reference was made to that section in the judgment nor to the Full Bench decision which related to its applicability."

SOMASUNDARAM PILLAI *v.* PROVINCIAL GOVERNMENT OF MADRAS, (1947) 1 M.L.J. 123.

The precise significance and legal effect of a bid at auction sales have often been considered. In the leading case of *Payne* v. *Cave*[3], it was remarked: "The auctioneer is the agent of the vendor and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer..........Every bidding is nothing more than an offer on one side which is not binding on either side till it is assented to." It follows that ordinarily till the bid is accepted it would be competent to the bidder to retract, *Raja of Bobbili* v. *Suryanarayana Rao*[4]. An instructive case as to the operation of this principle is *Champalal* v. *Ganshamdas*[5]. There the appellant went to an auction and made a bid for Rs. 29,200 in respect of a property and it turned out to be the highest bid that was made. Before however his bid was accepted and the property knocked down to him the appellant attempted to retract the bid having come to know that there was a mortgage on the property. The retraction was not permitted. In a suit in regard to the matter, Coutts-Trotter and Ramesam, JJ., held that the bid could be retracted and observed: "It seems to us that the very word 'bid' or 'bidder' is indicative of a person who is making an offer rather than concluding an arrangement......If I bid Rs. 20 and that is called an acceptance and a contract, and if another man bids Rs. 25 the next moment, it is another acceptance and another contract, it would seem that what is a good contract at one moment becomes entirely void immediately after. We think that a person who bids at an auction thereby does not conclude a contract but states an offer. And, like all other offers, it is subject to the ordinary incidents of law that, until it is accepted it is open to the offeror to withdraw it and render it as if it had not been made." The question then arises whether the insertion of a condition in the terms of sale that a bid cannot be withdrawn would make any difference in the matter. In *Champalal's case*[5], citing the opinion of Sugden in his book, Vendors and Purchasers[6], the learned Judges held that such a condition is not enforceable and would be waste paper. In *Agra Bank* v. *Hamlin*[7], where the question was whether a bidder at a Court auction sale can withdraw his bid before acceptance, Muttusami Ayyar, J., observed: "Until the lot is knocked down the Court has a *locus penitentiae* and......in the absence of a specific provision to the contrary, bidders are intended to be placed in a similar position." This dictum would suggest that there can be a condition against the retraction of bids. The suggestion has not been accepted as correct either in *Champalal's case*[5] or in the case under notice. It would however seem that the bidder cannot retract the

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1. (1946) 2 M.L.J. (N.R.C.) p. 1.
2. (1946) 1 M.L.J. 295: L.R. 73 I.A. 28: I.L.R. (1946) Lah. 63 (P.C.).
3. (1789) 3 Term Rep. 148: 100 E.R. 502.
4. (1919) 37 M.L.J. 274: I.L.R. 42 Mad. 776.
5. (1922) 43 M.L.J. 132: I.L.R. 45 Mad. 799.
6. Sixth Edition, Vol. I, p. 139.
7. (1891) I.L.R. 14 Mad. 235.

bid, if there was a condition to that effect supported by consideration, *Cooke* v. *Oxley*[1]. In the present case, at an abkari sale the appellant was the highest bidder. According to the conditions of sale it was provided *inter alia* that the selling officer could signify a provisional acceptance only, that if the Collector confirmed such provisional acceptance it would become final unless revised by the Board of Revenue, and that if the Collector considered the bid inadequate he might postpone passing orders confirming or refusing to confirm the provisional acceptance and might direct that the sale should be continued from the point at which it had been left. In fact it was this latter thing that happened. Before the starting of the further sale the bidder however gave notice of his withdrawal of the bid. The question then arose as to whether the withdrawal was permissible having regard to its provisional acceptance by the sale officer. The conditions in question were only rules drawn up by the Board of Revenue for the conduct of abkari sales and were by no means rules framed by the government under the Abkari Act. The question therefore fell to be decided in accordance purely with the principles of the law of contract. The bid had not been finally accepted. It remained in the stage of offer only and therefore could be retracted. The condition against withdrawal not being supported by any consideration would be unenforceable as held in *Champalal's case*[2]. And it was pointed out that the provisional acceptance cannot in itself make a binding contract.

Mt. Parkash Kaur v. Mt. Udham Kaur, (1947) 1 M.L.J. 127 (F.C.).

In this case the Federal Court has held that the interest of a mortgagee in possession of agricultural land, where he has no right to institute a suit for the recovery of the mortgage money or to enforce the mortgage by bringing the mortgaged property to sale, is a right in or over "agricultural land" within the meaning of entry 21 in List II to the 7th Schedule to the Government of India Act, 1935 and succession to the rights of such a mortgagee will be unaffected by the Hindu Women's Rights to Property Act, 1937. In *Megh Raj* v. *Allah Rakhia*[3], while holding that the expression "agricultural land" must be understood in the sense which it ordinarily bears in the English language, the Federal Court stated that "it was conceded before us on both sides that in the Constitution Act 'land' comprises both corporeal and incorporeal rights and interests". In *Khantamayi Debya* v. *Rukmini Deby*[4], the Calcutta High Court took the view that the expression "agricultural land" in entry 21 of List II to Schedule VII of the Government of India Act includes any interest in agricultural land whether as superior proprietor, tenure-holder, under-tenure-holder, raiyat or under-raiyat. Likewise in *Kotayya* v. *Annapurnamma*[5], it was held that a leasehold interest in agricultural land will also fall to be regarded as agricultural land to which the provisions of the Hindu Women's Rights to Property Act cannot apply. Incidentally it was suggested that even if the asset was a mortgage and not a lease the same result will follow. In *Ramaswami Sennandar* v. *Murugayya Kattavetti*[6], it was held that the interest of a simple mortgagee of agricultural land is an interest in agricultural land and would be outside the scope of the Hindu Women's Rights to Property Act. This view does not seem to fit in with the observations of Lord Atkin in delivering the judgment of the Privy Council in *The Imperial Bank of India* v. *The Bengal National Bank, Ltd.*[7], where the noble lord in speaking about the nature of a charge over assets of a company observed that the debt in it is distinct from the security and went on to state: "In any case the debts exist as moveable property; and do not, if secured, become identified with the security or transformed into land . . . The separation between debt and security is well established; the creditor is entitled to take a judgment for the debt without having recourse to his security". It would seem therefore that even if the mortgage concerned agricultural land, if the creditor was entitled to take a judgment for the debt without

1. (1790) 3 Term Rep. 653 : 100 E.R. 785.
2. (1922) 43 M.L.J. 132 : I.L.R. 45 Mad. 799.
3. (1942) 5 F.L.J. 33 : 4 F.C.R. 53.
4. (1944) F.L.J. 231.
5. (1945) 1 M.L.J. 191.
6. (1945) 1 M.L.J. 193.
7. (1931) 61 M.L.J. 589 : L.R. 58 I.A. 3 (P.C.).

having recourse to the security, the creditor's interest at an
be non-agricultural property and the Hindu Women's R
may apply. The Federal Court seems to be fully alive
Court remarked in distinguishing the Privy Council decisio
of an ordinary loan secured upon immoveable proper
would have been entitled in the words of their L
judgment for the debt without having recourse to his secu
case Harnam Singh had no right to recover the amount c
by suit at all. His interest at the time of his death was or
in possession entitled to receive the rents and profits of the
gage money was repaid and was in our judgment a right
land comprised in entry 21 of List II". In the light of the
that the ruling in *Ramaswami Sennandar* v. *Murugayya Katt*
consideration. It will be a nice question as to how the positi
to a simple mortgage where the personal covenant has becor

ARUMUGHA NAINAR KOIL DEVASTHANAM v. KANDASWA
1 M.L.J. 139.

An interesting question was decided in this case whic
trustee of a temple has become a ward of court, the Court
aside an alienation made improperly by the ward while f
prior to becoming a ward. In *Syed Ghulam Nabi Sahi*
recognised that a trustee who wrongfully alienated the pr
can himself set right the wrong done to the trust by him
for recovering possession. This was followed in *Subbiah Cl*
kari[3], where it was held that a man may act in one capacity
sentation that a village was his private property and in
he claims as trustee to recover the village as property held
such a case the rule of estoppel cannot operate against the tr
Dassee v. *Sookee Money Dassee*[4], the Judicial Committee obse
of trust in another instance cannot be pleaded against a trust
a repetition of abuse......The Court could not with
will decline to protect the property and leave it exposed to
to make a declaration merely because they would not tru
administration." Though these remarks in terms apply
of an abuse they were held by Krishnan, J., in *Yasim Sa*
to support in effect the view that a trustee who is trying to
has done should not be prevented from doing so by an esto
breach of trust by him, at any rate, where he derives no p
later action. In that case it was held that a trustee of a
private purposes mortgaged temple property which was a
auction at the instance of the mortgagee, can sue on behalf
the property for the trust though the purchaser may be
The principle is clearly enunciated in *Sivaswami Aiyar* v. *T*
it is observed : "A trustee of a religious or charitable tr
make any alienation of trust property except where it i
the interests of the trust. Any alienation which is not ju
or by reasonably accredited necessity for the purposes of th
decisions have gone to this extent, *viz.*, that in the case o
or charitable, even the trustee who alienates can bring a
the property and he is not personally estopped from doi
was the duty of the ward to recover the property, the Cou
the powers it has under section 63 of the Court of Wards A
endowments of which the ward is hereditary trustee, may
behalf and do the needful.

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1. (1945) 1 M.L.J. 193.
2. (1896) 6 M.L.J. 270.
3. (1908) 19 M.L.J. 305.
4. (1871) 14 Mo
5. (1919) 37 M.
6. (1928) 57 M.

ATTAR HUSSEIN *v.* FAZLI BROTHERS LIMITED, (1946) 48 Bom.L.R. 377.

Rule 199 of the Bombay High Court rule (O.S.) states : " Commercial causes include causes arising out of the ordinary transactions of merchants, bankers and traders whether of a simple or complicated nature, amongst others those relating to the construction of mercantile documents, export or import of merchandise, affreightment, carriage of goods by land, insurance, banking and mercantile agency and mercantile usages." In the above context, the question arose in the present case as to who is a trader. The plaintiff was a distributor of cinema films and the defendants were producers and distributors. An agreement was entered into between the parties by which it was alleged that the defendants had agreed to sell to the plaintiff the distribution rights in respect of certain social pictures of theirs for a period of six years. It was this agreement the breach of which by the defendants was set up and on which a suit for recovery of damages was brought. A summons was taken by the plaintiff for transfer of the suit to the list of commercial causes, as a suit arising out of the ordinary transactions of traders. Trade, from *trutta* (Ital.) means traffic or commerce. In Bouvier's Law Dictionary[1], trader is defined to be one who makes it his business to buy merchandise or goods or chattels and to sell the same for the purpose of making a profit. The general idea seems to be that there should be buying and selling with a view to make profit. It is true that ' trade ' was formerly used in the sense of an art or mystery, *e.g.*, that of a brewer or a tailor, but it now has the technical meaning of buying and selling, *Harris* v. *Amery*[2], *San Paulo Railway* v. *Carter*[3], *Grainger* v. *Gough*[4]. *Qua* bankruptcy laws, traders were stated to be " such as live by buying and selling"—*see* Jac. 1, ch.15, s. 1. In *Palmer* v. *Snows*[5], it was observed by Channel, J. : " Now although ' tradesman' may be sometimes used to describe something different from a gentleman or in contradistinction to other kinds of persons, I do not think the word is used in that sense in this Act. It seems to denote a person carrying on trade—buying and selling—and a barber does not come within the description." Nor can the term ' trader ' be extended to a farmer, *R.* v. *Silvester*[6], *Cleworth* v. *Leigh*[7]. The word ' trade ' has in some cases been held to include manufacture, In re *Duty on Estate of Incorporated Council of Law Reporting for England and Wales*[8]. But as Bramwell, B, has pointed outa merchant of or in an article can only mean one who buys and sells it and not the manufacturer selling, *Josselyn* v. *Parson*[9]. Thus though in the present case the plaintiff would be buying the distribution rights he will be doing so from the manufacturers or producers of the films. Nor is there the element of buying and selling associated with the defendants. They only sell but do not buy. It therefore seems that the transaction not being one between traders in this sense cannot be regarded as a commercial cause within the meaning of the rule set out above. That was also the conclusion reached in the present case.

EMPEROR *v.* PURDY, (1946) 48 Bom.L.R. 752.

An interesting point in the law of contempt fell to be elucidated in this case. It was held that no appeal will lie from an order committing for contempt passed by a Judge of the High Court to a Bench thereof and the High Court has no inherent jurisdiction to entertain any such appeal. In the case under notice, the accused was tried at the High Court Sessions. The trial ended in an order for re-trial. The accused called the Judge " a scoundrel in conspiracy with the police". Contempt proceedings were taken and in view of the accused's failure to apologise he was punished. On a question arising whether from such an order an appeal could be taken before a Bench, the decision as stated above was reached. Each

1. Vol. 2, p. 1131.
2. L.R. 1 C.P. 148.
3. (1896) A.C. 385.
4. (1896) A.C. 325.
5. (1900) 1 Q.B. 725, 727.
6. 33 L.J.M.C. 80.
7. 12 W.R. 375.
8. (1888) 22 Q.B.D. 279.
9. (1872) L.R. 7 Ex. 127, 129.

High Court has an inherent power to punish acts of contempt in respect of itself. In the cases of the chartered High Courts, the power is traceable in the ultimate analysis to the intrusion into the Presidency Towns, at the time the Supreme Courts were established by Charters in those places, of that part of the English common law. The High Courts Act, 1861 provided by section 9 that the High Courts shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the Act at the time of such abolition. Section 11 provided that the then existing provisions applicable to the Supreme Courts shall apply to the High Courts. The successive Government of India Acts have contained all such powers, jurisdiction and authority—*see* section 223 of the Constitution Act. Contempt of the High Court is no doubt not an offence dealt with under the Penal Code or the Criminal Procedure Code but it is an offence by reason of the introduction of the English common law into this country, *Surendranath Banerjee* v. *The Chief Justice and Judges of the High Court at Fort William in Bengal*[1]. The Letters Patent provide that the High Court as a Court of record can commit for contempt irrespective of whether the acts alleged constitute an offence under the Penal Code or not. (*Cf.*, Letters Patent of the High Courts of Calcutta, Bombay and Madras, clause 44 ; Allahabad, clause, 35 ; Patna, clause 41 ; Lahore, clause 37—*see also* section 220 of the Constitution Act.) Contempt of the High Court is criminal[2]. An appeal will therefore lie only if there was some statutory or other specific provision in that behalf. Section 411-A of the Criminal Procedure Code as now amended provides that without prejudice to the provisions of section 449, any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section 2, or in the Letters Patent of any High Court appeal to the High Court against a conviction. And it is expressly stated that clauses 25, 26 and 41 of the Letters Patent for the High Courts at Bombay, at Madras and at Fort William in Bengal shall cease to have effect. The appeal provided is in respect of a trial with a jury. The contempt proceedings are not of such character. It is clear that section 411-A cannot apply. It may be that before the amendment of the Letters Patent a right of appeal thereunder might have been available, but in view of the repeal of the relevant clause the Letters Patent can no longer avail for this purpose. The only source of jurisdiction that may still remain is the inherent jurisdiction of the High Court. It is true that every subject has an inherent right of appeal to His Majesty, see *Ambard* v. *Attorney-General of Trinidad*[3]. But the right claimed in the present case is not a right to appeal to His Majesty but to the High Court. The Calcutta High Court has suggested that the decision, that is to say, judgment, order and sentence must be taken to be final and not open to appeal, In re *Tushar Kanti Ghosh*[4]. It was held by the learned Judges in the present case that the High Court has no inherent jurisdiction to entertain any such appeal.

MADHUBHAI AMTHALAL *v.* AMTHALAL NANALAL, (1946) 48 Bom.L.R. 729.

An important practice point bereft of authority was decided in this case. Order 18, rule 17 of the Civil Procedure Code provides that the Court may at any stage of a suit recall any witness who has been examined and may put such questions to him as the Court thinks fit. There is however practically no case of a Court exercising its powers under this rule after judgment has been reserved. But question remains whether the Court has in fact such power. In the Evidence Act, section 165 lays down that the Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, *at any time* of any witness or of the parties about any fact relevant or irrelevant. The words 'at any time' negative the existence of any qualification as to the moment before the delivery of judgment when

1. (1884) L.R. 10 I.A. 171 : I.L.R. 10 Cal. 109 (P.C.).
2. *Jaitly* v. *Hon. Sir Iqbal Ahmad*, A.I.R. (1945) Oudh 266 ; *Radhey Lal* v. *Niranjan Nath*, I.L.R. (1941) All. 364.
3. (1936) A.C. 322.
4. (1935) I.L.R. 63 Cal. 287.

the questions may be put. Likewise the words " at any stage of a suit " convey *prima facie* the meaning ' at any time before the judgment is actually rendered.' An analogous provision is found in rule 18, of Order 18, which provides that the Court may, at any stage of a suit, inspect any property or thing concerning which any question may arise. With reference to this provision it has been held in *Amratlal* v. *Land Acquisition Officer, Ahmedabad*[1], that it is always desirable in cases where local inspection is necessary that the Judge should carry out the inspection at any stage before the arguments are heard, and that to make a local inspection after the arguments of both sides are over without an opportunity to the parties or their pleaders to challenge the notes, before judgment is pronounced, is not a proper procedure. The main point to be remembered is that there should be no prejudice to the parties in the sense that they have not had an oppotunity to test the correctness of either the Judge's notes or a witness's testimony made or given after the closing of the arguments and before the delivery of the judgment. If no objection of this character could be raised, then, there seems to be no reason why the words " at any stage of a suit" should not mean at any stage before judgment is actually pronounced. The analogy afforded by the provisions in Order 47, rule 1 may not be helpful. Under that rule a review may be applied for on the ground of the discovery of new and important evidence. It may be argued that if even after judgment has been delivered new evidence may be received subject to the limitations of the rule, there should be no objection to the reception of evidence before judgment is rendered and that it would stand *a fortiori*. It should however be remembered that the fresh evidence contemplated in Order 47, rule 1 " must at least be such as is presumably to be believed and if believed would be conclusive." *Cf.*, Lord Loreburn, L.C. in *Brown* v. *Dean*[2]. The conclusion in the case under notice that where after a Court has reserved judgment—the hearing being concluded—it finds that there is an ambiguity on the face of the record or an omission which wants clearing up, the Court can, in a proper case, under Order 18, rule 17 recall a witness who has given evidence, is thus in accordance with the considerations set out *supra*. It would follow that the power of the Court to so recall a witness may be exercised either *suo motu* or on application and the power being discretionary it ought to be exercised with the greatest care and only in the most peculiar circumstances.

ROBASA KHANUM v. KHODADAD BOMANJI IRANI, (1946) 48 Bom.L.R. 864.

The effect of a change of religion on the part of one of the spouses on the marriage contracted in their orginal faith has come up for consideration on many occasions and there is a certain amount of conflict of judicial opinion. In the present case the parties were originally domiciled in Persia. They were Zoroastrians and had married according to the Zoroastrian rites. Bombay became their domicile of choice. There were two sons of the marriage. Thereafter the wife became a convert to Islam, and three months later offered that religion to her husband who, however, declined to become a Muslim. Thereupon she brought an action for a declaration that her marriage with her husband stood dissolved. Blagden, J., before whom the suit was tried, and the Judges on appeal—Stone, C.J., and Chagla, J.,—held that the question fell to be decided according to the principles of justice and equity, there being a conflict as between the law applicable to the husband and the wife in regard to this particular matter. The provisions of the Parsi Marriage and Divorce Act, 1936 could not govern as the wife had ceased to be a Parsi at the time of the suit. Nor could the Muslim Marriages Act, 1939 apply inasmuch as the wife was not a woman married according to the Islamic law. In *Budansa Rowther* v. *Fatima Bi*[3], the Madras High Court had taken the view that where a conflict occurs between persons belonging to different religions the Court must apply the rules of justice, equity and good conscience. The Court had also held

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1. (1945) 47 Bom.L.R. 95 : A.I.R. 1945 Bom. 302.
2. (1910) A.C. 373.
3. (1913) 26 M.L.J. 260.

that in testing whether the first marriage of a Hindu husband was subsisting or not at the time she contracts a second marriage it is the principles of Hindu law that should be applied. In regard to the equities, it was recognised in the present case that though the denial of a remedy to the wife to have recourse to Muslim law would leave her altogether stranded, yet, *prima facie*, to hold that one spouse can by changing his or her religious opinions force his or her newly acquired personal law on a person to whom it is entirely alien and who does not want it is so monstrous an absurdity that "carried its own refutation with it." In *In the matter of Ram Kumari*[1], the Calcutta High Court seemed to recognise, though *obiter*, that if the procedure prescribed by the Mahomedan law had been followed by the wife after her conversion to Islam, her marriage with her Hindu husband might be dissolved leaving her free to marry again in her new faith. In *Noor Jehan Begum* v. *Eugene Tiscenko*[2], two persons, Christians, with a Russian domicile, had contracted a civil marriage at Berlin. There was a child of the marriage. The husband went to Edinburgh for medical studies and the wife came to India, adopted Islam, and invited her husband also to become a Muslim. On his refusal to do so she applied to the Court for a dissolution of her marriage with him in accordance with the procedure prescribed by the Islamic law. Edgley, J., held that the suit was not competent inasmuch as the domicile of the parties was foreign and not Indian. He however, went on to observe that, even if according to the laws of Islam a dissolution of the marriage could be granted on compliance with the prescribed procedure, such laws must be held to have become obsolete and as opposed to the principles of justice, equity and good conscience. He also held that a marriage contracted according to the tenets of one faith could not be dissolved except by a law applicable to both the parties or by following the mode, if any, indicated by the law under which the parties had originally contracted the marriage. It will be recognised that these remarks are obiter. An appeal against the decision of Edgley, J., was dismissed on the ground that the Court had no jurisdiction to entertain the suit in view of the foreign domicile of the parties[3]. The view of Edgley, J., in regard to the effect of apostasy on the prior marriage was dissented from by Ormond, J., in *Mussamat Ayesha Bibi* v. *Subodh Chakravarty*[4]. In the latter case the first marriage had been between two Hindus according to Hindu rites. Their married life was miserable. The wife became a convert to Islam, duly offered it to her husband, and on his refusal to accept the offer brought a suit for dissolution. The suit was decreed. This decision was in its turn dissented from and the view of Edgley, J., was followed in a still later case, *Sayeda Khatoon* v. *M. Obediah*[5]. There the first marriage was between persons professing Judaism according to Jewish rites. The wife later on became a Muslim and sought a dissolution of the marriage. It was held that the prior Jewish marriage could not be dissolved by one of the spouses becoming a Muslim and having recourse to the procedure prescribed by that law. Reference may also be made to the considerations mentioned in the note on *Andal Vaidyanathan* v. *Abdul Allam Vaidya* in (1947) 1 M.L.J. (N.I.C.) Page 4. In the decision under notice the Bombay High Court had adopted the view of Edgley, J. The matter is one of the greatest importance to all sections of the public and in view of the conflict of judicial opinion on the matter it is to be desired that the conflict should be set at rest by the Legislature.

KEMPAMMA *v.* RAGHA SETTY, (1947) 1 M.L.J. 153.

This case recognises that so long as the mortgagor has not parted completely with his interest in the mortgaged properties and continues to be liable under the mortgage he can make a part-payment of principal or interest which will serve under section 20 to start a fresh period of limitation operative against all the mortgaged items even if any of them have been alienated prior to such payment. In the

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1. (1891) I.L.R. 18 Cal. 264.
2. A.I.R. 1941 Cal. 582 : 45 Cal.W.N. 1047.
3. I.L.R. (1942) 2 Cal. 165.
4. (1945) 49 Cal.W.N. 439.
5. (1945) 49 Cal.W.N. 745.

judgment of the Full Bench in *Pavayi* v. *Palanivelu*[1], in discussing whether a payment made by a mortgagor after he had parted with the equity of redemption in all the mortgaged items and after the personal covenant against him was barred would give a fresh period of limitation as against the prior alienees, it was *inter alia* stated by the Chief Justice : " If he (the mortgagor) cannot bind the purchaser of the equity of redemption when the purchase covers the whole of the mortgaged properties obviously he cannot bind the purchaser of part of the mortgaged properties." The learned Chief Justice made also some remarks which were relied on as suggesting that in this matter there was practically no difference between section 19 and section 20 and that the prior assignees would not be affected by a payment made by the mortgagor. This, if correct, would lead to a contrary result in the case under notice. It is, however, clear that the remarks in question should be taken along with the observation of the Chief Justice in that case : " A payment ....to start a fresh period of limitation must be made by the person liable to pay the debt or by his agent duly authorised in that behalf. If the personal remedy against the mortgagor is barred he is no longer liable to pay the debt." It would then follow that where the personal covenant is not barred, the payment will operate to give a fresh limitation as against the assignee prior to such payment of the mortgaged items or any of them. This mode of reading the Full Bench judgment receives support from *Thayyanayaki Ammal* v. *Sundarappa*[2]. This latter decision points out that sections 19 and 20 of the Limitation Act do not stand on the same footing, that whereas under section 19 the payment should have been made by the party against whom the liability is sought to be enforced or by some one through whom he derives title or liability if it is to start a fresh limitation as against the party or persons in privity with him, section 20 merely requires that the person paying should be one liable to pay and saves the right of suit in its integrity against all the persons who might have been sued within the prescribed period. It was accordingly held that part-payment by a mortgagor under his personal liability even after he has parted with the mortgaged properties saves the right of suit against the purchaser of the equity of redemption from the bar of limitation. This decision has subsequently been followed in *Narayana Reddiar* v. *Venkatesa Reddiar*[3], where the learned Chief Justice referring to the case cited above observed : " We may add that we respectfully agree with the judgment in that case." It would thus appear to be fairly settled, so far as Madras is concerned, that a part-payment by a mortgagor would start a fresh period of limitation against an assignee of the mortgaged properties prior to such payment if at the time of the payment the personal covenant against the mortgagor was still enforceable. Where the personal covenant has been barred but the mortgagor has retained the equity of redemption in some of the items of mortgaged properties and makes a part-payment towards the mortgage amount it would appear that a prior assignee of any of the mortgaged items will not be affected as the liability of the mortgagor has become a proprietary liability only and in that sense could extend limitation only in respect of the properties he has got at that time.

JAGGAR NATH *v.* B. K. RAY, (1946) I.L.R. 25 Pat. 666.

This decision holds that under the proviso to section 58 (*c*) of the Transfer of Property Act if the condition envisaged in the section is not embodied in the document which effects or purports to effect the sale it is not open to the Court to treat the transaction as a mortgage. The section as amended in 1929 provides : " Where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made, the sale shall become

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1. (1940) 1 M.L.J. 766 : I.L.R. (1940) Mad. 872 (F.B.).
2. (1941) 2 M.L.J. 913.
3. (1943) 1 M.L.J. 135.

void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale: Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale." The language of the proviso is clearly in support of the view taken in the above case. If the transaction is embodied in a number of documents, it would follow that the condition should appear in some part of those documents. In *Kuppa Krishna Hegde* v. *Mhasti Goli Nath*[1], there are certain observations which seem to suggest that if the right of repurchase is embodied in more than one document, the inference of a mortgage would not *necessarily* arise. It was there stated: "In case a mortgagor passed in favour of a mortgagee an ostensible sale deed and the intention of the parties is to be arrived at by the construction of the document the proviso says that the right to re-purchase must be embodied in the same document, and that if it is embodied in more than one document, the inference of a mortgage would not necessarily arise and that no transaction should be deemed to be a mortgage by conditional sale unless the condition is embodied in the document of the ostensible sale." With great respect, it may be stated that the fact that the intention of the parties is embodied in more than one document cannot be material. As pointed out in *Ma Sein Nyo* v. *Maung San Pe*[2], the object of the proviso is only to shut out an enquiry whether a sale with a stipulation for retransfer is a mortgage where the stipulation is not embodied in the same document, see also *Venkatasubba Rao* v. *Veeraswami*[3]. The only meaning that can be given to it is that where the condition for retransfer is not embodied in the document that effects or purports to effect the sale the transaction shall not be treated as a mortgage, *Samsherkhan* v. *Vithaldas*[4]. To treat the proviso as suggesting that where such intention is embodied in a number of documents the inference of a mortgage could not be drawn or that where it is embodied in the same document as the sale an inference of mortgage would necessarily arise would not be warranted.

PUBLIC PROSECUTOR *v.* VISWANATHAN, (1947) 1 M.L.J. 179.

It is laid down by this decision that the offer of a bribe to a public servant after he had become *functus officio* in a particular matter will not amount to the offence of abetment of taking a bribe within the meaning of the Indian Penal Code. Under chapter XI of the Code the giving of bribe is not made a substantive offence. It is the taking that is so treated. The person that offers can only be punished as an abettor—*see* section 116 and section 109, illustration (*a*). A curious reason for the distinction has been given by the authors of the Code. It is that, while in countries where the people are independent the giver is generally the tempter and the receiver is the tempted; in a country like India, the position is the reverse. They therefore were "strongly of opinion that it would be unjust and cruel to punish the giving of a bribe in any case in which it could not be proved that the giver had really by his instigations corrupted the virtue of a public servant, who unless temptation had been put in his way would have acted uprightly." Admittedly this can be a consideration having temporary validity only in any event. Conditions of life in this country have considerably changed; education has spread on a large scale and the special atmosphere in which officialdom was supposed to live has disappeared mostly. It is therefore time, apart from anything else, to examine whether a re-orientation of the laws governing bribery is not needed. The Christian exorcism "Get thee behind me Satan" is not always uttered by persons in authority, official or otherwise, and attempts to corrupt will continue to be made whatever degree of fruition such attempts may achieve. Opinions are bound to differ as to who is more reprehensible, the person that offers the bribe or the person that receives. To give but one example, in *Emperor* v. *Kesri Chand*[5], while pointing out that the measure of punishment to be meted out to such persons must always

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1. A.I.R. 1931 Bom. 371.
2. A.I.R. 1935 Rang. 212.
3. (1946) 1 M.L.J. 342.
4. I.L.R. (1946) Nag. 278.
5. I.L.R. (1945) All. 450.

depend on the degree of shock to the conscience of society or state which the offence produces and that it is the concerted action of the giver and the receiver which produces a result constituting a menace to society, Iqbal Ahmed, C.J., went on to add "There can be no question of acceptance of illegal gratification unless there is some one to offer such gratification. The ball............is set rolling by the person who offers the bribe and as such he is the primary culprit." In the same case Malik J., said: "At the same time we have to bear in mind that the conduct of the officer accepting the bribe is probably more reprehensible than even the conduct of the contractor who gives the bribe." The learned Judge added: "To my mind the proper way of putting down this evil is to punish not only those who offer bribes but still more severely those who take bribes." The view that the offeror is more culpable than the acceptor and that the provisions of the Penal Code require overhauling were forcibly expressed by Coutts Trotter, C.J., in *Venkatarama Naidu*, In re[1]. The Chief Justice observed: "The law relating to bribery under the Penal Code is curious. It is confined in effect to public servants or those who regard themselves as in the way to public service and the operative section 161 refers only to the taker and not to the giver of the bribe, *the latter being by far the worse of the two.* The giver..............is only brought in under section 116, by the doctrine of abetment. I think that the state of the law is very unsatisfactory............ If a man in the vain hope of getting a public officer to reconsider a question as to which that public officer is *functus officio*, offers a bribe, he commits no offence by doing so and presumably the public officer would commit no offence by taking it......... I do think that it is time that fresh legislation were introduced into the Code to make these most dangerous offences of giving or taking bribes punishable in much wider terms than are contained in the Code at present. Moreover, there is no provision for the bribing of anybody except a public official and no provision at all corresponding to what is known in England as Fry's Act (Prevention of Corruption Act, 1906—6 Edw. 7., c. 34)" In the case before the learned Chief Justice, a candidate for the post of policeman was rejected by the officer who examined him, on the ground of his being short of the prescribed minimum height. Thereupon he tendered a five rupee note to the officer to make him reconsider his decision. It was held that no offence was committed. A case of the officer being merely *functus officio* might perhaps stand on a different footing from a case where the officer in question had not the necessary power to do the act required. If any, the attempt to bribe in the former case would seem to be more culpable. But there again different opinions are held. Thus in *Emperor* v. *Phul Singh*[2], it is pointed out that section 161 does not require that the public servant must in fact be in a position to do the official act, favour or service at the time it is sought, and therefore, if a person offers a bribe to a public servant his act would be punishable as abetment of the offence under section 116 of the Penal Code although the public servant does not happen to possess the necessary power to do the required favour or service. Be that as it may, the call for the overhauling of the provisions relating to bribery in the Penal Code, made nearly twenty years ago in *In re Venkatarama Naidu*[1], has again been made in the case under review where also reference is made to Fry's Act. In the present case a Textile officer had considered an application presented by the accused for the grant of a permit for an extra supply of yarn and had come to the conclusion that there was no case on the merits and had decided to reject the application; but the next day the accused appeared before him and repeated his request for the permit along with the offer of a bribe. Following the earlier Madras ruling, it was held that no offence of abetment of the taking of a bribe had been made out. It is to be hoped that this time at any rate the Government will act promptly in regard to the suggestion for the revision of the provisions relating to bribery.

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1. (1929) 57 M.L.J. 239.   2. A.I.R. 1941 Lah. 276.

NATARAJAN CHETTIAR *v.* VELLAYYAN CHETTIAR, (1947) 1 M.L.J. 180.

The beds and bunds of tanks, drainage, surplus or irrigation channels are according to section 3 (16) of the Estates Land Act outside the category of ryoti lands in an estate. Tanks in India form an important part of the irrigation system unlike in England and they have been in existence from very ancient times. They have been constructed by the state, or chieftains or by village communities. In the case of the tanks within the limits of zemindaris after the Permanent Settlement the responsibility for their upkeep and efficient maintenance has been usually vested with the zemindar. The rights of the ryots are founded on usage and custom. Whether a particular land in an estate falls within section 3 (16) is a matter to be decided by the Collector—*see* section 20. Under section 21, any person who may, occupying such land for any purpose other than that for which the land is so set apart, may within thirty years of such occupation be summarily evicted by the Collector in the manner provided by the Land Encroachment Act. The words " set apart " indicate some reservation or earmarking by the Government, the proprietor or the village community of the land as the case may be and the purpose for which such reservation has been made has ordinarily to be inferred from the usage appertaining to it—see *Ramanna* v. *Secretary of State*[1]. In the case of a tank the water from which is used exclusively for drinking purposes, it would follow that the doing of anything which will affect the purity or quality of the water, even if such acts are done on the bunds of the tank will be to use the land for a purpose other than that for which it has been set apart. Whether it be the proprietor or any third person that occupies the bund and does such act it would make no difference. If it is shown that the acts are such as would affect the quality of the water for drinking purposes then action under section 21 would be justified. In the present case it was shown that shops and sheds were erected on the bunds of the tank. It is apparent that the erection and running of shops is bound to affect the quality of the water in the tank inasmuch as its purity and cleanliness are likely to be impaired by offals drifting into the tank as well as by the inevitable acts of nuisance likely to be committed consequent upon the gathering of customers at the spot. The question is no doubt one of fact depending upon the circumstances of each case. When however it is actually found that the water has been affected by such acts it would follow that the erection of the shops is really a user of the land for a purpose other than that for which it is set apart. It is immaterial whether the alleged acts of impairment are spread over the entire area or only on parts of it, *Rama Chetty* v. *Arunachalam Chettiar*[2].

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1. A.I.R. 1936 Mad. 299.

2. (1915) 29 M.L.J. 724 : I.L.R. 39 Mad. 673.